(2)

NO. 91-188

In the Supreme Court of the United States

OCTOBER TERM, 1991

ELIZABETH ROSS ABSHIRE,
PETITIONER

VERSUS

GNOTS-RESERVE, INC. AND
COOPER/T. SMITH STEVEDORING COMPANY, INC.,
D/B/A TERRENCE DERRICK
& LIGHTERAGE CO., INC.,
AS OWNER AND OPERATOR OF THE D/B KEVIN,
AND GNOTS-RESERVE, INC.,
RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Submitted by:

GEORGES M. LEGRAND (8282)
DAVID M. FLOTTE (1364)
HEBERT, MOULEDOUX & BLAND
1650 Pan-American Life Center
601 Poydras Street
New Orleans, Louisiana 70130
Telephone: 504/525-3333
Attorneys for respondent,
Cooper/T. Smith Stevedoring
Company, Inc.

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

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RESPONSE TO PETITIONER'S "QUESTION PRESENTED FOR REVIEW"

Mrs. Elizabeth Abshire (hereinafter "Mrs. Abshire") has characterized the question presented for review as follows:

> Whether the Fifth Circuit has challenged the clear mandate set by the Jones Act and general maritime law when it abolished a seaman's right to use a "featherweight" standard of proof which includes a very low evidentiary threshold for submission of facts to a jury, by its refusal to use the prevailing summary judgment standard used by a majority of the circuits and this Court in Jones Act cases involving mysterious seamen drownings.

This phraseology by Mrs. Abshire incorrectly states that the U.S. Fifth Circuit did not apply the "featherweight" standard of proof, and suggests that this has created a conflict among the circuits. This is not correct. In particular, the U.S. Fifth Circuit specifically stated as follows:

> The burden to prove causation in a Jones Act case is "very light" or "feather-weight". *Landry v. Two R. Drilling Co.*, 511 F.2d 138, 142 (5th Cir. 1975). Under the Jones Act, a defendant must bear the responsibility for any negligence, however slight, that played a part in producing the plaintiff's injury. *See Landry v Oceanic Contractors, Inc.*, 731 F.2d 299, 302 (5th Cir. 1984).

In re Cooper/T. Smith (Abshire v. Gnots-Reserve, Inc.), 929 F.2d 1073, 1076 (5th Cir. 1991), appearing in petitioner's Appendix to Petition at A-13. Given this language, it is ludicrous for Mrs. Abshire to argue that the Fifth Circuit

abolished a seaman's right to use a "featherweight" standard of proof.

The United States Fifth Circuit affirmed the factual determination of U. S. District Judge Henry Mentz that there was a *total absence* of proof of causation, negligence and unseaworthiness. In that regard, the United States Fifth Circuit held:

> As there is *no evidence,* circumstantial or otherwise, to establish that the D/B KEVIN was unseaworthy, or that Cooper acted negligently or in any other way caused Abshire's death, there is a complete absence of proof of these essential elements. Therefore, summary judgment was proper. (Emphasis added)

In re Cooper/T. Smith, 929 F.2d at 1078, appearing in petitioner's Appendix to Petition at A-16.

This Court should note, preliminarily, that there is no basis for the argument of Mrs. Abshire that the District Court and the Fifth Circuit applied the wrong evidentiary standard, because both Courts found that there was a *total absence* of proof by petitioner against Respondents, Cooper/T. Smith Stevedoring Company, Inc. (hereinafter "Cooper") and Gnots-Reserve, Inc. (hereinafter "Gnots"). Therefore, *there is no question presented for review.*

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STATEMENT OF THE CASE

On February 19, 1988, Donald Abshire (hereinafter "Mr. Abshire") was one of two crane operators working aboard the D/B KEVIN, a derrick barge which was discharging a cargo of rolled steel coils from the S.S. PARASKEVI into river barges at a mid-river anchorage near Ama, Louisiana. The starboard side of the D/B KEVIN was moored to the starboard side of the S.S. PARASKEVI, a bulk carrier which was anchored at mid-river. The bow of the S.S. PARASKEVI was pointed upriver; the bow of the D/B KEVIN was pointed downriver. Three river barges, which were used to receive and transport the steel coils, were moored to the port side of the D/B KEVIN. Those barges included Barge ACBL-2892, which was first off; Barge ACBL-1403, which was second off; and Barge ACBL-1323, which was third off. The position of the vessels is more fully set forth in a hand-written diagram prepared by Darrel Gonsoulin, which has been lodged in the record of this matter. Mr. Gonsoulin, a co-employee of Mr. Abshire, was one of the last persons to see Mr. Abshire before his disappearance.

The D/B KEVIN had completed its loading of Barge ACBL-2892 before the disappearance of Mr. Abshire, and the M/V GNOTS I, an inland pushboat, was in the process of pulling Barge ACBL-2892 out from between the D/B KEVIN and Barge ACBL-1403 around the time of the disappearance of Mr. Abshire.

Shortly before Mr. Abshire's disappearance, Gonsoulin had walked up to Mr. Abshire to "bum a cigarette" and was talking with Mr. Abshire near the upriver corner of the D/B KEVIN on the side away from the S.S. PARASKEVI and closest to Barge ACBL-2892 and the other two cargo barges. Mr. Abshire told Gonoulin that he

was "going to catch a line", and, at that time, Mr. Abshire walked off the D/B KEVIN across the head of Barge ACBL-2892 toward Barges ACBL-1403 and ACBL-1323. Gonsoulin did not know whether the line Mr. Abshire was going to catch was located on Barge ACBL-1323, ACBL-1403 or ACBL-2892. Robert Smith, another co-employee of Mr. Abshire, saw Mr. Abshire walking across the head of Barge ACBL-2892 and no one saw or spoke with Mr. Abshire after that time.

It is unknown whether Mr. Abshire reached the line which he was going to "catch" or what cargo barge he was located on at the time of his disappearance. Around this time, Captain Andrew Sherman, the pilot of the M/V GNOTS I, prepared to move Barge ACBL-2892 from its position, but neither bumped it nor jarred ACBL-2892. (*See In re Coper/T. Smith*, 929 F.2d at 1075, appearing in petitioner's Appendix to Petition at A-11.) In fact, the pushknees of the M/V GNOTS I never came in contact with Barge ACBL-2892 because of driftwood that had accumulated around the stern of the barge. Once the M/V GNOTS I faced up to Barge ACBL-2892 and Captain Sherman saw that no Cooper personnel were on the deck of the barge, he began backing the barge up and out of its position alongside the D/B KEVIN. At this time, Captain Sherman had full view of the deck of Barge ACBL-2892 and never saw anyonne slip or fall, including Mr. Abshire, who he knew by sight. (*See In re Cooper/T. Smith*, 929 F.2d at 1076, appearing in petitioner's Appendix to Petition at A-11.)

Within five minutes of the time Mr. Abshire was last seen, his co-employees noticed he was missing and conducted an immediate search of the area. The United States Coast Guard was promptly notified and assisted in the search; however, Mr. Abshire could not be located. Mr.

Abshire's body was recovered in the Mississippi River some four months later, and, at the time his body was found, no life preserver was present. To this date, no one knows what happened to Mr. Abshire on the date he disappeared, why he went into the water, or even which cargo barge he was located on at the time he went into the water. (*See In re Cooper/T. Smith*, 929 F.2d at 1076, appearing in petitioner's Appendix to Petition at A-12.)

It is undisputed that Mr. Abshire walked off of the D/B KEVIN with no difficulty as was last seen walking away from the D/B KEVIN (the only vessel owned or operated by Cooper) prior to his disappearance. An inspection of all of the river barges produced no explanation for Mr. Abshire's disappearance. There were no defects present on the barges or any foreign substances on the decks. The cargo involved was steel coils which was a "clean" cargo which resulted in no debris being present. The only vessel movements were ordinary movements which were expected by all Cooper personnel, including Mr. Abshire.

Mr. Abshire was seen wearing his work vest or life preserver on the day of his accideant, although no one can state whether his life vest or life preserver was being worn at the time he went into the water because no one saw Mr. Abshire go into the water. Mr. Abshire's co-employees cannot recall whether he was wearing a work vest or life preserve at the time they last saw him; however, it is undisputed that Cooper's company policy is that work vests are required.

The sole basis of alleged culpability presented by Mrs. Abshire in the District Court was that Cooper was negligent in its company policy with regard to work vests. Under Cooper's company policy, an employee was provided with a *U. S. Coast Guard-approved* company work vest but could elect to use his own personal work vest, provided

it was *U. S. Coast Guard-approved.* Mrs. Abshire presented *no evidence* to suggest that there would be any difference between the performance of various U. S. Coast Guard-approved work vests, depending upon whether same were purchased by Mr. Abshire rather than Cooper. She also presented *no evidence* of any defect in the work vest used by Mr. Abshire on the date of his disappearance. (*See In re Cooper/T. Smith,* 929 F.2d at 1078, appearing in petitioner's Appendix to Petition at A-16.) No evidence was presented of any unseaworthiness and it is undisputed that Mr. Abshire's disappearance did not even occur from the D/B KEVIN or as a result of any of its equipment or personnel.

MISSTATEMENTS OF FACT BY MRS. ABSHIRE

In accordance with Rule 15.1 of the Supreme Court Rules, this Court should note that Mrs. Abshire has made the following misstatements of fact in addition to the misstatements set forth above in her "question presented":

Mrs. Abshire states that her husband *slipped* or *was thrown* from the deck of Barge ACBL-2892 into the Mississippi River *suddenly* and *without warning.* (*See* Petition, at p. 2.) This is not correct, and there is no evidence to support this conclusion. In fact, the Fifth Circuit found that no one knows what happened to Mr. Abshire and that "Mrs. Abshire presented no evidence that Mr. Abshire was even on Barge ACBL-2892 when the M/V GNOTS I was maneuvering into position, or that [Mr.] Abshire was on that barge" when he went into the water. (*See In re Cooper/T. Smith,* 929 F.2d at 1077, appearing in petitioner's Appendix to Petition at A-14.)

Mrs. Abshire's next misstatement is that the river barges were filled with "different materials". (*See* Petition,

at p. 2.) This is not correct. Each river barge received the same type of materials, i.e., rolled steel coils, which is a "clean" cargo. (*See In re Cooper/T. Smith,* 929 F.2d at 1075, appearing in petitioner's Appendix to Petition at A-10.)

Mrs. Abshire's next misstatement is that there was a conflict in the testimony between U. S. Coast Guard Officer William G. Wetherington (who issued a report finding that there was no culpability on behalf of Cooper or Gnots) and the testimony of Captain Sherman. (*See* Petition, at p. 3.) This is not correct. Officer Wetherington presented no testimony or affidavits in the District Court; however, his report was considered (a copy of which is included in Respondent's Appendix A) in accordance with *Beech Aircraft Corporation v. Rainey,* 488 U.S. 153, 109 S.Ct. 439, 102 L.Ed.2d 445 (1988). Mrs. Abshire is apparently arguing that there was a dispute as to when prop wash of the M/V GNOTS I was used to free certain debris during shifting operations. This alleged conflict in testimony does not have anything to do with Cooper who was neither the owner nor the operator of the M/V GNOTS I, Barge ACBL-1323, Barge ACBL-1403 or Barge ACBL-2892. In addition, as this Court can see from the report of Officer Wetherington (appearing in Respondent's Appendix A), Officer Wetherington never specifically addressed this issue in his report, and no other evidence from Officer Wetherington was considered by the Court.

The next misstatement of Mrs. Abshire is that she proved that Mr. Abshire fell from Barge ACBL-2892 rather than one of the other barges. Mrs. Abshire failed to establish this, based on the uncontroverted factual testimony of Captain Sherman, who stated that he recognized Mr. Abshire and that Mr. Abshire was not present on the deck of Barge ACBL-2892 at the time that he

pulled that barge out from between the D/B KEVIN and the second-off barge. (*See In re Cooper/T. Smith,* 929 F.2d at 1076, appearing in petitioner's Appendix to Petition at A-2, A-3, A-5 and A-6.)

SUMMARY OF ARGUMENT

The Petition For A Writ of Certiorari filed herein by Mrs. Abshire, does not present any legal or factural basis or other good cause to support either the granting of the requested writ or the need for briefs or argument on the merits. *See* Sup. Ct. R. 10.1 and 20. Mrs. Abshire argues that the wrong standard of proof was applied by the United States District Court for the Eastern District of Louisiana and the United States Fifth Circuit Court of Appeals; and then implies that there is some conflict between the Circuits concerning the issues presented. This is not correct. Both courts below properly found a *total absence* of proof by Mrs. Abshire of various essential elements of her claims. Supreme Court Rules 10.1 and 14.1(j) require that a petitioner specifically set forth the basis upon which the petitioner seeks a writ. There are no issues presented in Mrs. Abshire's brief which would provide good cause for this Court to take any further action other than summarily dismissing Mrs. Abshire's Petition.

ARGUMENT

Mrs. Abshire argues that speculation, conjecture and possibilities suffice to support a jury verdict based upon *Landry v. Two R. Drilling Company,* 511 F.2d 138 (5th Cir. 1975), and *Gibson v. Elgin, Joliet & Eastern Railway Company,* 246 F.2d 834, 836 (7th Cir. 1957), *cert. denied,* 355 U.S. 897, 78 S.Ct. 270,2 L.Ed. 193 (1957). (*See* Petition, at pp. 6-7.) This is not correct. *Tennant v. Peoria & P.U. RY. Co.,* 321 U.S. 29, 64 S.Ct. 409, 88 L.Ed. 520 (1944);

Martin v. John W. Stone Oil Distributor, Inc., 819 F.2d 547, 549 (5th Cir. 1987).

Landry and *Gibson* are not applicable because they are factually distinguishable from the Abshire case and because they involve a different type of "speculation" than involved in the Abshire case. In this regard, both *Landry* and *Guidry* discussed the United States Supreme Court case of *Lavender v. Kurn*, 327 U.S. 645, 66 S.Ct. 740 (1946).

In *Lavender*, a railway worker was killed after being struck in the head with an object. *Direct evidence* showed that a mail hook rod of a railroad car was too low when that car passed very close to the decedent shortly before his death. The decedent's body was found very close to the railroad tracks with a fatal head injury. The testimony presented showed that the blow to the decedent's head was consistent with his being struck by a mail hook rod which was too low. The defendants in *Lavender* argued that the decedent had been mugged and that his head injury was caused by the blunt instrument of a mugger. The decedent had a gun which was dislodged from its holster at the time his body was found. A jury found that the plaintiff was injured as a result of being struck by the mail hook rod which was too low. The Missouri Supreme Court reversed the judgment that had been entered in accordance with the jury verdict. However, the U. S. Supreme Court reversed and reinstated the jury verdict, finding that *there was adequate direct and circumstantial evidence* for a jury to infer that the plaintiff had been killed as a result of being struck by the mail hook rod. The Supreme Court, in rendering its decision, stated:

> It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that

> fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. *Only when there is a complete absence* of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. (Emphasis added)

Lavender, 327 U.S. at 653, 66 S.Ct. at 744.

In the instant case, there is *no evidence* to show what happened to Mr. Abshire and *no evidence* of any negligence on the part of Cooper, or any unseaworthiness of the D/B KEVIN, which in any way caused or contributed to Mr. Abshire's disappearance. In short, there is a *complete* absence of proof by Mrs. Abshire with respect to unseaworthiness, causation and the negligence of Cooper. (*See In re Cooper/T. Smith,* 929 F.2d at 1075, appearing in petitioner's Appendix to Petition at A-9.) In *Lavender,* on the other hand, the Court had substantial direct and circumstantial evidence to explain the reason for the decedent's death. Direct testimony established that the mail hook rod was too low. Circumstantial evidence included the position of the body and the size of the head wound. No similar direct or circumstantial evidence is present in this case.

The other two appellate court decisions relied upon by Mrs. Abshire with regard to speculation do not support her position. The Seventh Circuit opinion in *Gibson* quoted the above language from *Lavender* and allowed a plaintiff to testify and provide his own conclusions as to why he slipped on a foreigh substance in an office. *Gibson,* 246

F.2d at 836. In that case, the plaintiff was injured when he was moving equipment and testified that he must have slipped on pebbles which were allowed to accumulate because his employer negligently removed a mat used by workers to wipe their feet in an office. This obviously is not a missing seaman case and, therefore, *Gibson* has no applicability. Furthermore, *Gibson* is distinguishable because the plaintiff in *Gibson* presesnted direct testimony of what had occurred and explained why he thought it occurred.

The only other case that Mrs. Abshire cites in support of her argument with regard to speculation is *Landry,* which is likewise factually distinguishable. In *Landry,* a seaman was negligently struck on the hand by a co-employee, causing the loss of several fingers. After he was injured and only had the use of one hand, the toolpusher of his rig told him to go into the galley and watch television or, alternatively, if he wished, he could carry ice and root beers to his co-workers who were working in a nearby area. The plaintiff's immediate supervisor, the driller aboard the rig, contradicted the orders of the toolpusher and forced the plaintiff to work in a different area of the vessel, handling a high pressure hose which reequired use of both hands, in an area without proper handrails. According to expert testimony, this was done in violation of U. S. Coast Guard regulations. Circumstantial evidence demonstrated that the plaintiff fell overboard and drowned because he was forced to work with an injured hand, in direct violation of the instructions of the toolpusher, and due to defective handrails.

The opinion in *Landry* does not address speculation; however, in a concurring opinion, Judge Gee implied that he was skeptical of the correctness of the U.S. Supreme Court's comments concerning speculation, conjecture and possibilities. Nevertheless, when this Court reviews the

authorities cited by Mrs. Abshire, it is apparent that the type of "speculation and conjecture" discussed in *Lavender, Gibson* and *Landry* was not really speculation and conjecture at all. The verdicts were based upon strong, direct and circumstantial evidence, and the court in *Lavender* was only concerned with the limited measure of speculation which is required whenever facts are in dispute and reasonable jurors disagree. *Lavender,* 327 U.S. at 653, 66 S.Ct. at 744.

No material facts are in dispute in the Abshire case and there is a *total absence of proof* of negligence on the part of Cooper in connection with the disappearance of Mr. Abshire. In addition, with regard to unseaworthiness, Mr. Abshire departed from the D/B KEVIN and was walking across the head of Barge ACBL-2892 toward Barge ACBL-1403 and Barge ACBL-1323 when he was last seen. It is unknown whether Mr. Abshire went into the water from Barge ACBL-1403, Barge ACBL-1323 or Barge ACBL-2892; however, there is no doubt that Mr. Abshire never went into the water from the D/B KEVIN, the only vessel owned, operated or controlled by Respondent. (*See In re Cooper/T. Smith,* 929 F.2d at 1073, appearing in petitioner's Appendix to Petition at A-15.)

Mrs. Abshire has also cited certain cases dealing with missing seamen; however, none of those cases are applicable because all involve a specific *factual basis* for negligence or unseaworthiness. In *Admiral Towing Company v. Woolen,* 290 F.2d 641 (9th Cir. 1961), the vessel in question had no lifeboat, no life raft and no functioning ship-to-shore radio when it set out to sea with a two-man crew which included a 17 year old deckhand with no sea experience. *Woolen,* 290 F.2d at 643-44, 646. Expert testimony established that the foregoing constituted unseaworthiness.

In *Harris v. Whiteman*, 243 F.2d 563, 564 n.1 (5th Cir. 1957), *rev'd sub nom. Butler v. Whiteman*, 356 U.S. 271, 78 S.Ct. 734, 2 L.Ed.2d 754 (1958), the vessel in question bad a bitt which was too low, which was used as a step to gain access to another vessel. Again, there was direct evidence of a defect in the vessel's equipment.

In *Gaymon v. Quinn Menhaden Fisheries of Texas, Inc.*, 118 So.2d 42 (Fla. App. 1960), a seaman had to answer the call of nature in a boat equipped with toilet facilities for the captain's use only and the decedent apparently fell overboard while he was attempting to relieve himself. *Gaymon*, 118 So.2d at 44. The evidence showed that the vessel owner was negligent in failing to allow a seaman to use the captain's toilet.

In *Landry v. Two R. Drilling Company*, after a plaintiff sustained an injury to one of his hands, he was ordered to handle a high pressure hose (which required the use of both hands) and was forced to work in an area of the vessel without adequate handrails, where he fell overboard.

In *Schulz v. Pennsylvania Railroad Company*, 350 U.S. 523, 76 S.Ct. 608, 100 L.Ed. 668 (1956), the evidence showed lack of lighting and personnel, and the plaintiff's body was found in the water with a flashlight still in his hand. Direct evidence proved a lack of lighting, and circumstantial evidence (his grip on the flashlight) showed causation between the lack of lighting and the accident.

Mrs. Abshire argues that, in *Daughenbaugh v. Bethlehem Steel Corp.*, 891 F.2d 1199 (6th Cir. 1989), the Sixth Circuit Court of Appeals held that the question of liability for a seaman's mysterious drowning should be left for the jury. *Daughenbaugh* dealt with a situation in which an intoxicated seaman disappeared from a dock

while being escorted back to his ship by officers of the ship. However, the facts also established that the ship had an unwritten policy that allowed drunken seamen to return to the vessel, and that seamen in that condition would be escorted in order to ensure their safety. *Id.* at 1208. Although the district court granted a motion for summary judgment filed on behalf of the vessel owner, the Sixth Circuit reversed, finding that there was conflicting testimony among the witneses and several genuine issues of material fact. *Id.* at 1209.

Mrs. Abshire also argues that the Sixth Circuit's reluctance to dispose of Jones Act claims through summary judgment was shared by the Fourth Circuit in *Van Horn v. Gulf Atlantic Towing Corp.*, 388 F.2d 636 (4th Cir. 1968). This is incorrect because *Van Horn* did not involve claims under the Jones Act or claims being asserted on behalf of a missing seaman. Furthermore, in *Van Horn*, the plaintiff alleged that he slipped on a slippery substance on the deck and there was direct evidence indicating that the substance was present. As such, the appeals court found that there were genuine issues of material fact, and held that summary judgment was inappropriate.

In contrast to the foregoing cases, there are no genuine issues of material fact, and there is no evidentiary basis to support any finding of negligence or unseaworthiness in the instant case. In fact, both lower courts found that there was a complete absence of proof with respect to Mrs. Abshire's claims. The District Court considered the opinion of Officer William G. Wetherington in accordance with *Beech Aircraft Corporation v. Rainey*, 488 U.S. 153, 109 S.Ct. 439, 102 L.Ed.2d 445 (1988); Fed. R. Evid. 803(8)(C). This opinion stated that there was "no evidence of culpability for this casualty". (*See* Respondent's Appendix A.) This conclusion of the U. S. Coast Guard was uncontroverted even after the parties exchanged expert reports.

The Circuits have consistently held that even though reasonable inferences can be determined by a jury, it is inappropriate for a jury to consider a missing seaman case where there is a "complete absence of proof of any essential element". *Martin v. John W. Stone Oil Distributor, Inc.*, 819 F.2d 547 (5th Cir. 1987).

In *Smith v. Reinauer Oil Transport, Inc.*, 256 F.2d 646 (1st Cir. 1958), *cert. denied*, 358 U.S. 889, 79 S.Ct. 133, 3 L.Ed.2d 117 (1958), a seaman became missing for reasons that could not be explained. Mrs. Abshire,similarly, has no evidence to explain why Mr. Abshire disappeared. The District Court granted the defendant's motion for directed verdict in *Smith* and the appellate court affirmed.

In *Swain v. Mississippi Valley Barge Line Company*, 244 F.2d 821 (3rd Cir. 1957), *cert. denied*, 355 U.S. 933, 78 S.Ct. 414, 2 L.Ed.2d 415 (1958), the District Court dismissed the complaint of the heirs of another missing seaman and the Third Circuit affirmed, finding that there was no evidence of causation. In the case at bar, there is no evidence of causation and no evidence of negligence or of unseaworthiness. There is no direct or circumstantial evidence to show why Mr. Abshire became missing or where he went into the water.

Mrs. Abshire argues that the jury should have been allowed to completely disregard the facts and find liability and causation by "inferences". The first inference which Mrs. Abshire argues should have been left up to the jury is that Cooper should have instructed or directed Captain Sherman or the M/V GNOTS I how to pull the barge in question out of position. Preliminarily, this Court should note that Cooper had no responsibility, obligation or duty to provide instructions to Captain Sherman. Essentially, Cooper was responsible for loading the barges, and the M/V GNOTS I and Captain Sherman were responsible for mov-

ing the barges. Moreover, this argument is merely an afterthought and was not even presented or preserved at the District Court level. (*See In re Cooper/T. Smith,* 929 F.2d at 1078, appearing in petitioner's Appendix to Petition at A-16.) As such, it cannot be raised for the first time on appeal.

The next "inference" is that Gnots was negligent by bumping the barge in question. Mrs. Abshire again requests that this Court allow the jury to disregard the facts, because there was no such sudden movement. (*See In re Cooper/T. Smith,* 929 F.2d at 1075, appearing in petitioner's Appendix to Petition at A-11.) Any such movement would be the responsibility of Gnots, rather than Cooper. However, employees of both companies were present and observed the movement of the barges and vessels in question, and the testimony of everyone verified that there was no unusual or sudden movement of the barges. Mrs. Abshire's suggesting that the jury be allowed to draw inferences from these facts would be an invitation to the jury to disregard the facts.

Mrs. Abshire next argues that the jury could have inferred that Cooper's life vest policy was inadequate, either because *Mr. Abshire could choose* between two U.S. Coast Guard-approved work vests or because *Mr. Abshire may have violated* Cooper's company policy by removing his work vest before he descended into the water. Under either scenario, there is no factual basis for a reasonable jury to conclude that Cooper was negligent, the D/B KEVIN was unseaworthy, or that either of the two caused or contributed to Mr. Abshire's death.

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law". Fed.

R. Civ. P. 56(c). A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party". *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). "Material facts" are "facts that might affect the outcome of the suit under the governing law...." *Id.*

Although a jury in a Jones Act case is entitled to make permissible inferences from unexplained events, summary judgment is nevertheless warranted when there is a complete absence of proof of an essential element of the nonmoving party's case. *Martin*, 819 F.2d at 549.

CONCLUSION

The facts and the inferences supporting those facts reveal no factual basis by which either Cooper or Gnots could be negligent or the D/B KEVIN could be unseaworthy. The District Court judge found that there was a *total absence* of proof of negligence, unseaworthiness and causation by Mrs. Abshire and granted Motions For Summary Judgment of Cooper and Gnots. The Fifth Circuit applied the featherweight standard of proof and the slightest degree of negligence test, and specifically found that there was a *total absence* of proof of these essential elements by Mrs. Abshire. Accordingly, the Fifth Circuit affirmed the District Court.

Mrs. Abshire has now submitted a brief to this Court disregarding the proceedings below and the legal standards applied by both Courts. Mrs. Abshire has neither presented a question involving a conflict between the Circuits or any other questions which would justify an exercise of judicial discretion of this Court pursuant to Supreme Court Rule 10.

For the above and foregoing reasons, the District Court and Appeals Court properly applied the law and, as such, the Petition of Elizabeth Ross Abshire For Certiorari to the United States Fifth Circuit Court of Appeals should be denied.

Respectfully submitted,

GEORGES M. LEGRAND (8282)
DAVID M. FLOTTE (1364)
HEBERT, MOULEDOUX & BLAND
1650 Pan-American Life Center
601 Poydras Street
New Orleans, Louisiana 70130
Telephone: 504/525-3333
Attorneys for respondent,
Cooper/T. Smith
Stevedoring Company, Inc.

CERTIFICATE OF SERVICE

I hereby certify that three copies of the above and foregoing Brief In Opposition To Petition For Writ Of Certiorari To Review A Judgment Of The United States Court Of Appeals For The Fifth Circuit by respondent, Cooper/T.Smith Stevedoring Company, Inc., has been forwarded to all counsel of record via the United States Postal Service, postage pre-paid and properly addressed on this ____ day of August, 1991.

GEORGES M. LEGRAND
DAVID M. FLOTTE

APPENDIX A

Commanding Officer (sio)
U.S. Coast Guard Marine
Safety Office

1440 Canal Street
New Orleans, LA 70112-2711
Phone: (504) 589-6251

16732
MC88001281/WGW
30 Aug 88

From: Investigating Officer, Coast Guard Marine Safety Office New Orleans
To: Commandant (G-MMI-1)
Via: Commanding Officer, Coast Guard Marine Safety Office New Orleans

Subj: DROWNING DEATH OF DONALD P. ABSHIRE, LAST SEEN ON FREIGHT BARGE ACBL 2892 (O.N. 565396) AT MILE 116 AHOP, LOWER MISSISSIPPI RIVER, ON 19 FEBRUARY 1988

1. The investigation of this casualty is complete. A narrative report will not be submitted.

2. The proximate cause of this casualty cannot be determined. It is probable that Mr. Abshire fell from the freight barge ACBL 2892 into the river while handling lines.

3. On 19 February 1988, Donald Abshire was the crane operator of the derrick barge KEVIN which was discharging cargo from the M/V PARASKEVI to barges at AMA Anchorage near St. Rose, Louisiana. The Kevin was

moored port side to the PARASKEVI and on its starboard side, the ACBL 2892, ACBL 1403 and ACBL 1323 were tied one side to another, respectively. These vessels were isolated from any access to the barge fleets moored alongside the river banks by at least 170 to 200 feet of water.

4. After the ACBL 2892 was loaded, Abshire and Robert Smith prepared to handle lines to allow the pushboat GNOTS I to move the loaded barge upriver. Darrell Gonsulin (crane operator for the FRANK L) came aboard the KEVIN for a smoke break and stood near the winch at the bow. Abshire had told Gonsulin he was going to handle a line between the two barges outboard of the KEVIN and Gonsulin assumed he meant the ACBL 1323 and the ACBL 1403. Abshire was last seen by Gonsulin and Smith on the bow of ACBL 2892 as he headed toward the ACBL 1403. He was missed 5 minutes later. No one saw Mr. Abshire leave any of the barges. An immediate search of the area was to no avail.

5. Acting on the presumption that Mr. Abshire fell, slipped or was knocked overboard, an extensive search was conducted by a Coast Guard vessel and aircraft and several other vessels in the area with negative results. Mr. Abshire's body was found on 16 june 1988 near AMA Anchorage.

16732
MC88001281/WGW
30 Aug 88

Subj: DROWNING DEATH OF DONALD P. ABSHIRE, LAST SEEN ON FREIGHT BARGE ACBL 2892 (O.N. 565396) AT MILE 116 AHOP, LOWER MISSISSIPPI RIVER, ON 19 FEBRUARY 1988

6. This investigation explored all items required to be addressed by 46 USC 6301. There is no evidence of culpability for this casualty. Additionally there is no evidence to suggest that drugs or alcohol were a factor. Therefore, it is recommended that this investigation be closed.

W. G. WETHERINGTON

Encl: (1) M/V GNOTS I Form CG-2692
(2) Robert Smith 1 Mar 88 Statement
(3) Darrell Gonsulin 2 Mar 88 Statement
(4) Captain Andrew Sherman 18 Jun 88 Telcon Summary
(5) I.O. Note dtd 27 Jun 88
(6) Donald P. Abshire Death Certificate

(sic)
Aug 31 1988

FIRST ENDORSEMENT

From: Commanding Officer, Coast Guard Marine Safety Office New Orleans
To: Commandant (G-MMI-1)

1. Forwarded approved.

A.W. KLOTZ

WETHERINGTON; wgt; 29AUG88;
[SIOYABSHIRE2LOT

APPENDIX B

U. S. Supreme Court Rules

Rule 10. Considerations Governing Review on Writ of Certiorari

.1 A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

.2. The same general considerations outlined above will control in respect to a petition for a writ of certiorari to review a judgment of the United States Court of Military Appeals.

U. S. Supreme Court Rules

Rule 14. Content of the Petition for a Writ of Certiorari

.1. The petition for a writ of certiorari shall contain, in the order here indicated:

(a) The questions presented for review, expressed in the terms and circumstances of the case, but without unnecessary detail. The questions should be short and concise and should not be argumentative or repetitious. They must be set forth on the first page following the cover with no other information appearing on that page. The statement of any question presented will be deemed to comprise every subsidiary question fairly included therein. Only the questions set forth in the petition, or fairly included therein, will be considered by the Court.

(b) A list of all parties to the proceeding in the court whose judgment is sought to be reviewed, unless the names of all parties appear in the caption of the case. This listing may be done in a footnote. See also Rule 29.1 for the required listing of parent companies and nonwholly owned subsidiaries.

(c) A table of contents and a table of authorities, if the petition exceeds five pages.

(d) A reference to the official and unofficial reports of opinions delivered in the case by other courts or administrative agencies.

(e) A concise statement of the grounds on which the jurisdiction of this Court is invoked showing:

(i) The date of the entry of the judgment or decree sought to be reviewed;

(ii) the date of any order respecting a rehearing, and the date and terms of any order granting an extension of time within which to file the petition for a writ of certiorari;

(iii) Express reliance upon Rule 12.3 when a cross-petition for a writ of certiorari is filed under that Rule and the date of receipt of the petition for a srit of certiorari in connection with wihich the cross-petition is filed; and

(iv) The statutory provision believed to confer on this Court jurisdiction to review the judgment or decree in question by writ of certiorari.

(f) The constitutional provisions, treaties, statutes, ordinances, and regulations involved in the case, setting them out verbatim, and giving the appropriate citation therefor. If the provisions involved are lengthy, their citation alone will suffice at this point and their pertinent text must be set forth in the appendix referred to in sub-paragraph .1(k) of this Rule.

(g) A *concise* statement of the case containing the facts material to the consideration of the questions presented.

(h) If review of a judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised; the method or manner of

raising them and the way in which they were passed upon by those courts; and such pertinent quotation of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (*e.g.*, ruling on exception, portion of court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari. When the portions of the record relied upon under this subparagraph are voluminous, they shall be included in the appendix, referred to in subparagraph .1(k) of this Rule.

(i) If review of a judgment of a United States court of appeals is sought, the statement of the case shall also show the basis for federal jurisdiction in the court of first instance.

(j) A direct and concise argument amplifying the reasons relied on for the allowance of the writ. See Rule 10.

(k) An appendix containing, in the following order:

(i) The opinions, orders, findings of fact, and conclusions of law, whether written or orally given and transcribed, delivered upon the rendering of the judgment or decree by the court whose decision is sought to be reviewed.

(ii) Any other opinions, orders, findings of fact, and conclusions of law rendered in the case by courts or administrative agencies, and, if reference thereto is necessary to ascertain the grounds of the judgment or decree, of those in companion cases. Each

document shall include the caption showing the name of the issuing court or agency, the title and number of the case, and the date of entry.

(iii) Any order on rehearing, including the caption showing the name of the issuing court, the title and number of the case, and the date of entry.

(iv) The judgment sought to be reviewed if the date of its entry is different from the date of the opinion or order required in sub-subparagraph (i) of this subparagraph.

(v) Any other appended materials.

If what is required by subparagraphs .1(f), (h), and (k) of this Rule to be included in or filed with the petition is voluminous, it may be presented in a separate volume or volumes with appropriate covers.

.2. The petition for writ of certiorari and the appendix thereto, whether in the same or a separate volume, shall be produced in conformity with Rule 33. The Clerk shall not accept any petition for a writ of certiorari that does not comply with this Rule and with Rule 33, except that a party proceeding *in forma pauperis* may proceed in the manner provided in Rule 39.

.3. All contentions in support of a petition for a writ of certiorari shall be set forth in the body of the petition, as provided in subparagraph .1(j) of this Rule. No separate brief in support of a petition for a writ of certiorari will be received, and the Clerk will refuse to file any petition for a writ of certiorari to which is annexed or appended any supporting brief.

.4. The petition for a writ of certiorari shall be as short as possible and may not exceed the page limitations

set out in Rule 33.

.5. The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying the petition.

U. S. Supreme Court Rules

Rule 15. Brief in Opposition: Reply Brief; Supplemental Brief

.1. A brief in opposition to a petition for a writ of certiorari serves an important purpose in assisting the Court in the exercise of its discretionary jurisdiction. In addition to other arguments for denying the petition, the brief in opposition should address any perceived misstatements of fact or law set forth in the petition which have a bearing on the question of what issues would properly be before the Court if certiorari were granted. Unless this is done, the Court may grant the petition in the mistaken belief that the issues presented can be decided, only to learn upon full consideration of the briefs and record at the time of oral argument that such is not the case. Counsel are admonished that they have an obligation to the Court to point out any perceived misstatements *in the brief in opposition*, and not later. Any defect of this sort in the proceedings below that does not go to jurisdiction may be deemed waived if not called to the attention of the Court by the respondent in the brief in opposition.

.2. The respondent shall have 30 days (unless enlarged by the court or a Justice thereof or by the Clerk pursuant to Rule 30.4) after receipt of a petition within which to file 40 printed copies of an opposing brief disclosing any

matter or ground as to why the case should not be reviewed by this Court. See Rule 10. The brief in opposition shall comply with Rule 33 and with the requirements of Rule 24 governing a respondent's brief, and shall be served as prescribed by Rule 29. A brief in opposition shall not be joined with any other pleading. The Clerk shall not accept a brief which does not comply with this Rule and with Rule 33, except that a party proceeding *in forma pauperis* may proceed in the manner provided in Rule 39. If the petitioner is proceeding *in forma pauperis*, the respondent may file 12 typewritten copies of a brief in opposition prepared in the manner prescribed by Rule 34.

.3. A brief in opposition shall be as short as possible and may not exceed the page limitations set out in Rule 33.

.4. No motion by a respondent to dismiss a petition for a writ of certiorari will be received. Objections to the jurisdiction of the Court to grant a writ of certiorari may be included in the brief in opposition.

.5. Upon the filing of a brief in opposition, the expiration of the time allowed therfor, or an express waiver of the right to file, the petition and brief in opposition, if any, will be distributed by the Clerk to the Court for its consideration. However, if a cross-petition for a writ of certiorari has been filed, distribution of both it and the petition for a writ of certiorari will be delayed until the filing of a brief in opposition by the cross-respondent, the expiration of the time allowed therefor, or an express waiver of the right to file.

.6. A reply brief addressed to arguments first raised in the brief in opposition may be filed by any petitioner, but distribution and consideration by the Court under paragraph .5 of this Rule will not be delayed pending its filing. Forty copies of the reply brief, prepared in accordance

with Rule 33 and served as prescribed by Rule 29 shall be filed.

.7. Any party may file a supplemental brief at any time while a petition for a writ of certiorari is pending calling attention to new cases or legislation or other intervening matter not available at the time of the party's last filing. A supplemental brief must be restricted to new matter. Forty copies of the supplemental brief, prepared in accordance with Rule 33 and served as prescribed by Rule 29, shall be filed.

U. S. Supreme Court Rules

Rule 20. Procedure on a Petition for an Extraordinary Writ

.1. The issuance by the Court of an extraordinary writ authorized by 28 U.S.C. § 1651(a) is not a matter of right, but of discretion sparingly exercised. To justify the granting of any writ under that provision, it must be shown that the writ will be in aid of the Court's appellate jurisdiction, that there are present exceptional circumstances warranting the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court.

.2. The petition in any proceeding seeking the issuance by this Court of a writ authorized by 28 U.S.C. §§ 1651(a), 2241, or 2254(a), shall comply in all respects with Rule 33, except that a party proceeding *in forma pauperis* may proceed in the manner provided in Rule 39. The petition shall be captioned "*In re* [name of petitioner]" and shall follow, insofar as applicable, the form of a petition for a writ of certiorari prescribed by Rule 14. All contentions in support of the petition shall be included in the petition.

The case will be placed on the docket when 40 printed copies, with proof of service as prescribed by Rule 29 (subject to subparagraph .4(b) of this Rule), are filed with the Clerk and the docket fee is paid.

.3. (a) A petition seeking the issuance of a writ of prohibition, a writ of mandamus, or both in the alternative, shall set forth the name and office or function of every person against whom relief is sought and shall set forth with particularity why the relief sought is not available in any other court. There shall be appended to the petition a copy of the judgment or order in respect of which the writ is sought, including a copy of any opinion rendered in that connection, and any other paper essential to an understanding of the petition.

(b) The petition shall be served on the judge or judges to whom the writ is sought to be directed and shall also be served on every other party to the proceeding in respect of which relief is desired. The judge or judges and the other parties may, within 30 days after receipt of the petition, file 40 printed copies of a brief or briefs in opposition thereto, which shall comply fully with Rule 15. If the judge or judges who are named respondents do not desire to respond to the petition, they may so advise the Clerk and all parties by letter. All persons served shall be deemed respondents for all purposes in the proceedings in this Court.

.4. (a) A petition seeking the issuance of a writ of habeas corpus shall comply with the requirements of 28 U.S.C. §§ 2241 and 2242, and in particular with the provision in the last paragraph of § 2242 requiring a statement of the "reasons for not making application to the district court of the district in which the applicant is held." If the relief sought is from the judgment of a state court, the peti-

tion shall set forth specifically how and wherein the petitioner has exhausted available remedies in the state courts or otherwise comes within the provisions of 28 U.S.C. § 2254(b). To justify the granting of a writ of habeas corpus, the petitioner must show exceptional circumstances warranting the exercise of the Court's discretionary powers and must show that adequate relief cannot be obtained in any other form or from any other court. These writs are rarely granted.

(b) Proceedings under this paragraph .4 will be *ex parte,* unless the Court requires the respondent to show cause why the petition for a writ of habeas corpus should not be granted. A response, if ordered, shall comply fully with Rule 15. Neither the denial of the petition, without more, nor an order of transfer to a district court under the authority of 28 U.S.C. § 2241 (b), is an adjudication on the merits, and therefore does not preclude further application to another court for the relief sought.

.5. When a brief in opposition under subparagraph .3(b) has been filed, when a response under subparagraph .4(b) has been ordered and filed, when the time within which it may be filed has expired, or upon an express waiver of the right to file, the papers will be distributed to the Court by the Clerk.

.6. If the Court orders the case to be set for argument, the Clerk will notify the parties whether additional briefs are required, when they must be filed, and, if the case involves a petition for a common law writ of certiorari, that the parties shall proceed to print a joint appendix pursuant to Rule 26.

APPENDIX C

Federal Rules of Evidence

Rule 803. Hearsay Exceptions: Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) **Present sense impression.** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) **Excited utterance.** A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) **Then existing mental, emotional, or physical condition.** A statement of the declarant's then existing state of mind, emotion, sensation or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) **Statements for purposes of medical diagnosis or treatment.** Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably petinent to diagnosis or treatment.

(5) **Recorded recollection.** A memorandum

or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) **Records of regularly conducted activity.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the tertimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) **Absence of entry in records kept in accordance with the provisions of paragraph (6).** Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) **Public records and reports.** Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) **Records of vital statistics.** Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) **Absnece of public record or entry.** To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the reocrd, report, statement, or data compilation, or entry.

(11) **Records of religious organizations.** Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) **Marriage, baptismal, and similar certificates.** Statements of fact contained in a certificate that the maker

performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) **Family records.** Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) **Records of documents affecting an interest in property.** The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicabale statute authorizes the recording of documents of that kind in that office.

(15) **Statements in documents affecting an interest in property.** A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) **Statements in ancient documents.** Statements in a document in existence twenty years or more the authenticity of which is established.

(17) **Market reports, commercial publications.** Market quotations, tabulations, lists, directories, or other

published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) **Learned treatises.** To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) **Reputation concerning personal or family history.** Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.

(20) **Reputation concerning boundaries or general history.** Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.

(21) **Reputation as to character.** Reputation of a person's character among associates or in the community.

(22) **Judgment of previous conviction.** Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment

in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) **Judgment as to personal, family or general history, or boundaries.** Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

(24) **Other exceptions.** A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interest of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.